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IN THE

Supreme Court of the United States

LUIS DUBÓN OTERO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
CONCLUSION	8

TABLE OF AUTHORITIES

Cases: Page

Batson v. *Kentucky*, 476 U.S. 79 (1986) 4
Duren v. *Missouri*, 439 U.S. 357 (1978) 1, 3
Fischer v. *United States*, 529 U.S. 667 (2000) 5, 6
Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) 7
Taylor v. *Louisiana*, 419 U.S. 522 (1975) 1
United States v. *Benmuhar*, 658 F.2d 14 (1st Cir. 1981), *cert. denied sub nom. Nieves* v. *United States*, 457 U.S. 1117 (1982) 4, 5
United States v. *Dempsey*, 830 F.2d 1084 (10th Cir. 1987) 3
United States v. *Fischer*, 168 F.3d 1273 (11th Cir. 1999), *aff'd*, 529 U.S. 667 (2000) 6
United States v. *Flores-Rivera*, 56 F.3d 319 (1st Cir. 1995) 4
United States v. *Morris*, 977 F.2d 677 (1st Cir. 1992), *cert. denied*, 507 U.S. 988 (1993) 2
United States v. *Olano*, 507 U.S. 725 (1993) 2, 3
United States v. *Rivera-Rosario*, 300 F.3d 1 (1st Cir. 2002) 2
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 7

Constitutional Provisions:

U.S. Constitution, Article I, § 8 7
Article III 4
Sixth Amendment 1

Statutes:

18 U.S.C. § 666 ..... 5, 6, 7
21 U.S.C. § 1177 5

Rules:

Federal Rules of Criminal Procedure, Rule 23 3

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous:

ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT, 2001 4

U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION, SOCIAL AND ECONOMIC CHARACTERISTICS, PUERTO RICO (1993) 2

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REPLY TO BRIEF IN OPPOSITION

I.

1. The brief in opposition fails to confront the central point: petitioner was tried by a jury drawn from a jury pool that quite unnecessarily excluded the majority of the population of the federal district of Puerto Rico. Under *Duren* v. *Missouri*, 439 U.S. 357 (1978), and *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), that exclusion violated petitioner's Sixth Amendment right to "a petit jury from a representative cross section of the community," *Taylor*, 419 U.S. at 528—unless the government can demonstrate "a significant state interest manifestly and primarily advanced by those aspects of the jury-selection process." *Duren*, 439 U.S. at 367-68. "The right to a proper jury cannot be overcome on merely rational grounds." *Taylor*, 419 U.S. at 534; *Duren*, 439 U.S. at 367.

The government argues that the exclusion of the majority of Puerto Ricans because they do not speak English "manifestly advances significant government interests." Br. Opp. 9. But the interests the brief in opposition attempts to articulate turn out in the case of Puerto Rico to be insubstantial:

a. The government argues that "if jurors do not speak a common language, they cannot communicate among themselves." *Id.* But that concern has no substance in the case of Puerto Rico. For 98% of Puerto Ricans speak Spanish.[1] Puerto Rico is "the sole district within the American federal judiciary where . . . almost every juror is fluent in English and Spanish." *United States* v. *Rivera-Rosario*, 300 F.3d 1, 4 (1st Cir. 2002). "[W]e recognize that most jurors, and even judges, in Puerto Rico may be more comfortable speaking in Spanish than in English . . . ." *Id.* at 20. Indeed, it is common knowledge, and approved by the courts, that jury deliberations in federal courts in Puerto Rico commonly are conducted in Spanish. See *United States* v. *Morris*, 977 F.2d 677, 689 (1st Cir. 1992) (no error for federal jury to deliberate in Spanish because "nothing stated in this statute, implicitly or explicitly, requires that federal jurors *deliberate* in English") (emphasis in original), *cert. denied*, 507 U.S. 988 (1993).

b. Ignoring that reality—that virtually everyone in the Puerto Rico jury pool speaks Spanish—the government assumes that translators would usually be needed in the jury room, and argues that their presence would be improper. It cites *United States* v. *Olano*, 507 U.S. 725 (1993), which involved the very different situation of alternate jurors present during jury deliberations—and held that even in that case

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[1] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION, SOCIAL AND ECONOMIC CHARACTERISTICS, PUERTO RICO 923 (1993); see Pet. Cert. 19.

their presence was neither plain error nor prejudicial.[2] Moreover, translators when needed are permitted in jury rooms in the federal courts. See *United States* v. *Dempsey*, 830 F.2d 1084, 1091 (10th Cir. 1987)(upholding presence of translator for deaf juror, noting that the practice is commonplace, and that "an important social policy argues against automatically foreclosing members of an important segment of our society from jury duty simply because they must take an interpreter into the jury room").

c. The government argues that not to exclude the majority of Puerto Ricans "would have far-reaching consequences," because some federal districts outside Puerto Rico may contain unspecifed groups that are unable to speak English. The government assumes that multiple translators would be required. Br. Opp. 9.

That suggestion—which, of course, goes to the merits, not to certiorari—is ill-conceived for at least three reasons. First, under *Duren*, the exclusion must be of such magnitude as to prevent the jury pool from reflecting a fair cross section of the community. See 439 U.S. at 367-69. There are no federal districts—and the government identifies none—with non-English-speaking segments anywhere even approaching the magnitude of the exclusion here. Indeed, the government cites no evidence whatsoever that any other federal district in the United States has even substantial numbers of otherwise-eligible persons who do not speak English, much less numbers sufficient for a *prima facie* showing under *Duren*.

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[2] *Olano* distinguished an advisory committee note to Fed. R. Crim. P. 23(b), which observed that "the deliberations of the jury shall remain private and secret," as inapplicable when there was no "improper influence."

Second, the federal courts are deeply involved in and capably performing translation services. They already provide translators in nearly a hundred languages.[3]

Third, the issue in this case does not involve the treatment of scattered small pockets of non-English-speakers. Rather, it concerns the exclusion from jury service of the *majority* of the population in the *only* federal district with a non-English-speaking majority, the federal district of Puerto Rico. It concerns a jury-selection system that "effectively excludes two-thirds of the population of Puerto Rico." *United States* v. *Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995). But a federal jury "must be a body drawn from the community." *Batson* v. *Kentucky*, 476 U.S. 79, 87 n.8 (1986).

d. The government (again arguing the merits) cites symbolism. It contends, without elaboration, that the federal court in Puerto Rico is "designed to provide trial alternatives" and that exclusion of the non-English-speaking majority "is both symbolically and functionally significant in achieving this goal." Br. Opp. 10, quoting *United States* v. *Benmuhar*, 658 F.2d 14, 20 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982).

But ceasing to exclude the majority of the population from service as federal jurors will not alter the role or procedure or availability of the federal district court. It will not affect any symbolism (except to remove the negative symbolism of an unjustifiable and stigmatizing exclusion). It will not interfere with the conduct of court proceedings in English. It will not alter in any way the uniformity of that court with other federal district courts, using the same Article III judges, the same federal rules of criminal and civil procedure, the same federal laws. Uniformity in the federal district courts has

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[3] In fiscal year 2001 the number of languages was 88. ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT, 2001, at 14. The five most frequently used were Spanish (94.5%), Mandarin, Arabic, Russian and Cantonese. *Id.* See also Pet. Cert. 18 n.12.

nothing to do with, and does not depend upon, unconstitutional exclusion of jurors.

2. The federal district court in Puerto Rico is already entirely capable of providing efficient and unobtrusive translation. It does so all the time. See Pet. Cert. 17-18. Indeed, in almost every federal criminal trial in Puerto Rico an interpreter sits off to the side and simultaneously translates from English to Spanish for wireless-headset-wearing, non-English-speaking witnesses and defendants.[4] Adding a few extra headsets for non-English-speaking jurors will not jeopardize the government's stated goals of "uniformity, expertise, and familiarity," Br. Opp. 10, quoting *United States* v. *Benmuhar*, 658 F.2d at 20, nor the conduct of federal proceedings in English. Rather, federal criminal trials in Puerto Rico will stay exactly the same—except that defendants, like defendants in the other ninety-three federal districts, will be tried by juries representing a fair cross section of the population.

II.

3. With respect to 18 U.S.C. § 666, the government would leave this criminal statute effectively without boundaries. The government argues that the funding for Advance Community Health Services, Inc. is analogous to the Medicare payments in *Fischer* v. *United States*, 529 U.S. 667 (2000), because the funding for AIDS care and drug treatment "was designed to 'insure care of good quality, in general community care facilities.'" Br. Opp. 11-12, quoting 21 U.S.C. § 1177(f). But the desire to "insure care of good quality" is a standard so vague, vast and open-ended that it could apply to almost any program that receives money from a state or

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[4] The federal courtrooms in Puerto Rico are equipped with state-of-the-art infrared simultaneous translation systems. The interpreter whispers into a microphone, and the translation is transmitted through infrared sensors to the headphones of as many defendants and witnesses as choose to use them. See Pet. Cert. 17-18.

municipal government entity that at some remote point in the past received federal funding. The distinction in *Fischer* was between reimbursements for services rendered and "benefits." *Fischer* classified Medicare funding to hospitals as a federal "benefit" because of the numerous conditions and regulations placed on the hospitals. But there were no such conditions, rules or regulations placed on ACHS, Inc. The government's argument ignores this critical distinction.

4. The government argues that the connection between an original grant of federal benefits and the distant organization allegedly suffering conversion can have multiple intermediaries, and be wholly attenuated. It argues simply that "[s]ection 666 does not draw a distinction between those entities that receive funding directly and those that receive funding indirectly through intermediaries." Br. Opp. 13. In this case, the alleged federal benefits went through at least three tiers—from the federal government's National Institute on Drug Abuse, to the Commonwealth of Puerto Rico, to the Municipality of San Juan. And prior to reaching ACHS, Inc., the federal funding was "'mixed and commingled'" with non-federal funding. See Pet. Cert. 24 (quoting concession by the government). The government maintains that this three-tier chain (it says nothing about the commingling) is permissible because the link between the funding and the program can be indirect. Yet the only support for the government's and the court of appeals' interpretation of *Fischer* is the lower court's opinion in that case, see Pet. Cert. 13a, quoting *United States* v. *Fischer*, 168 F.3d 1273, 1278 (11th Cir. 1999), an interpretation which this Court in *Fischer* rejected as overbroad. See 529 U.S. at 677 (declining to "endors[e] the Government's broader position"). Relying on such a painfully attenuated connection between the federal funding and ACHS, Inc., would stretch *Fischer* beyond its already strained limits.

5. The government also contends that conviction even though ACHS, Inc., received no "federal benefits" prior to

February 1991 was "harmless error." Br. Opp. 12. According to § 666, for the statute to apply, ACHS, Inc., must have received $10,000 in federal benefits within any one year. If the alleged conspiracy began in 1989, then for conviction the clinic had to have received federal benefits prior to 1991. The court below made a point of finding that one of three possible pre-1991 sources of funds constituted "benefits." See Pet. Cert. 11a. That is not harmless error about the wording of a jury instruction, but rather is failure to prove an essential element of a federal criminal offense.

6. Finally, the government argues that petitioners waived their claim that their convictions violate the Spending Clause, Art. I, § 8, based on the lack of connection between the alleged misconduct and a federal interest. Br. Opp. 14. But petitioners plainly argued in the Court of Appeals, which rejected the argument, that their convictions violated the Spending Clause and exceeded the scope of the statute. See Pet. Cert. 23a-24a; Brief of Appellant Dubón Otero, Court of Appeals, at 43 ("violated the Spending Clause of the United States Constitution"), 44 (same). The government's opposition confuses the preservation of a claim, which petitioners have done in this case, with making particular arguments about the claim. See *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to precise arguments they made below."); *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.

Respectfully submitted,

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